



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 19, 1982

MEMORANDUM

TO : William French Smith
Attorney General

Edward C. Schmults
Deputy Attorney General

Theodore Olson
Assistant Attorney General

Jonathan Rose
Assistant Attorney General

Wm. Bradford Reynolds
Assistant Attorney General

Thomas P. DeCair, Director
Office of Public Affairs

Stanley E. Morris
Associate Deputy Attorney General

✓ Kenneth W. Starr
Counselor to the Attorney General

Tex Lezar
Special Counsel to the Attorney General

John G. Roberts, Jr.
Special Assistant to the Attorney General

FROM: Robert A. McConnel *[Signature]*
Assistant Attorney General

RE : Voting Rights - The District Court's Decision
in Mobile v. Bolden

RECEIVED
OFFICE OF THE
ATTORNEY GENERAL
APR 19 11 25 AM '82

Attached please find copies of two letters. Letters identical to the one addressed to Chairman Thurmond were delivered to each member of the Senate Judiciary Committee over the weekend. Letters identical to the attached letter to Senator Zorinsky were delivered to all other members of the United States Senate this weekend.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 16, 1982

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond:

With the Committee on the Judiciary scheduled to consider the extension of the Voting Rights Act on April 27, we feel it is most important that you be fully aware of an event that has just occurred which sheds new light on the issues involved.

The central issue in that debate is whether to retain the current "intent test" in Section 2, as the Subcommittee on the Constitution has voted to do, or whether to change existing law and adopt an "effects test" for that Section, as proposed in the House bill. In its 1980 decision of Mobile v. Bolden, the Supreme Court upheld that the intent test was the standard under Section 2. Supporters of the House bill have argued that Mobile must be overturned and an effects test established because intent is "impossible" to prove.

On Thursday, however, the intent test was satisfied in the Mobile case itself. The district judge hearing the case on remand from the Supreme Court agreed with the position of the Department of Justice and ruled that the plaintiffs had met their burden of proving discriminatory intent. The history of the Mobile litigation itself thus now stands as tangible proof that the Mobile intent standard is not unduly difficult.

Nor is this finding of discriminatory intent in any way unusual. The intent standard has been met in other cases since the Supreme Court decision in Mobile, for example in Lodge v. Buxton from the Fifth Circuit and, just last Wednesday, in Perkins v. City of West Helena from the Eighth Circuit. Lower federal courts as well have had little difficulty finding discriminatory intent. See, most recently, Sanchez v. King (D.C.N.M.).

It is now clear beyond doubt that the asserted reason for changing Section 2 -- that the existing intent test is too difficult -- simply has no basis in fact. Section 2 should be retained unchanged. Further, we believe the Voting Rights Act as it now stands, should be extended for 10 years in accordance with the position of the President.

Sincerely,

Robert A. McConnell
Assistant Attorney General



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 16, 1982

Honorable Edward Zorinsky
United States Senate
Washington, D.C. 20510

Dear Senator Zorinsky:

An event has just occurred which sheds new light on the debate concerning the Voting Rights Act.

The central issue in that debate is whether to retain the current "intent test" in Section 2, as the Subcommittee on the Constitution of the Senate Judiciary Committee has voted to do, or whether to change existing law and adopt an "effects test" for that Section, as proposed in the House bill. In its 1980 decision of Mobile v. Bolden, the Supreme Court upheld that the intent test was the standard under Section 2. Supporters of the House bill have argued that Mobile must be overturned and an effects test established because intent is "impossible" to prove.

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It is now clear beyond doubt that the asserted reason for changing Section 2 -- that the existing intent test is too difficult -- simply has no basis in fact. Section 2 should be retained unchanged. Further, we believe the Voting Rights Act as it now stands, should be extended for 10 years in accordance with the position of the President.

Sincerely,

Robert A. McConnell
Assistant Attorney General



U.S. Department of Justice
Office of the Attorney General

Voting Rights

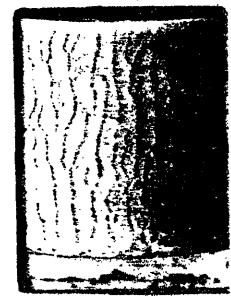
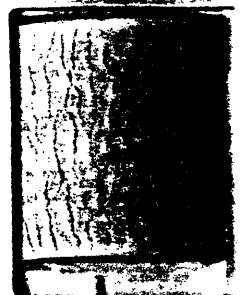
Counselor to the Attorney General

February 16

NOTE FOR THE AG:

John Roberts is reviewing our Voting Rights Act files. Thus far, the only memorandum received from Messrs. Hooks and Neas does not refer to Section 2. However, the Hooks-Neas letter to you refers to memoranda, so we're continuing the search by examining the files in Brad's shop. John will complete the redraft of the letter once the file search has been completed. That should occur in the next day or two.

cc: John Roberts



Memorandum



Subject	Date
Compromise Position on Section 2 of the Voting Rights Act	February 16, 1982

To Brad Reynolds
✓Ken Starr
David Hiller
Chuck Cooper

From John Roberts *JOR*

The Attorney General has requested the preparation of a "fallback" position on §2 of the Voting Rights Act, a compromise we could live with if necessary. One approach would be to explicate in §2 what we have been saying is true of the state of the law: that purpose can be shown through indirect evidence -- including evidence of effects -- and that a "smoking gun" is not required. I think some finessing will be necessary, since §2 does not by its terms require proof of purpose and any effort to introduce the concept directly will hardly be viewed as a compromise.

Just to get the ball rolling, I have taken a stab at adding to §2 the various factors identified in Arlington Heights as relevant on the question of intent. I would appreciate any thoughts you may have on this approach or changes in the language. I would hope we could present a tentative proposal to the Attorney General for his consideration before the end of the week.

Proposed section 2:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

In determining whether a state or political subdivision has violated this provision, the court should consider both direct and indirect evidence of purpose, including but not limited to evidence of legislative and administrative history, departures from ordinary practice, the effects or consequences of the action in question, the historical background, and the sequence of events leading to the action."

Memorandum



Subject
League of Women Voters
Mailing re Voting Rights Act

Date
March 22, 1982

To The Attorney General

From Carolyn B. Kuhl

A handwritten signature in dark ink, appearing to be "CBK", is written over the printed name "Carolyn B. Kuhl".

Brad Reynolds has sent the attached letter to the President of the League of Women Voters regarding inaccuracies in the League's mailing regarding the Voting Rights Act. Copies of the letter and its enclosures were sent to all Directors and Trustees of the League.

cc: Deputy Attorney General
Robert McConnell
Thomas DeCair
John Roberts



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 19, 1982

Ms. Ruth Hinerfeld
President
League of Women Voters
1730 M Street, N.W.
Tenth Floor
Washington, D. C. 20036

Dear Ms. Hinerfeld:

It has come to my attention that the League of Women Voters recently conducted a mail campaign soliciting contributions to "help the League's Emergency Campaign on Voting Rights. . . ." I am writing you because the two-page letter which was distributed over your name unfairly misrepresents the President's position on the extension of the Voting Rights Act, as that position has been explained in testimony before Congress by representatives of the Department of Justice.

Your letter states that the Administration is "supporting changes in the Act that would gut all its enforcement provisions." This is flatly incorrect. The Administration supports a straight ten-year extension of the enforcement provisions of this important civil rights legislation without change.

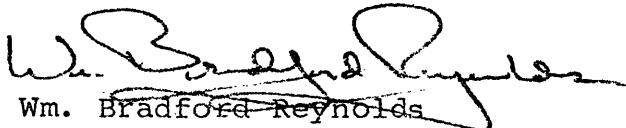
The recommended changes to the Act are contained in a bill passed by the House of Representatives which includes a proposed amendment to Section 2, or the permanent provision, of the Voting Rights Act. The amendment seeks to remove the intent test that has been in Section 2 since the Act was passed in 1965, and put in its stead an "effect" standard that measures a violation on the basis of election results. The Administration opposes this proposed change to Section 2 because it would permit political subdivisions across the country -- at all levels of government -- to be branded "discriminatory" whenever their election results failed to mirror the racial or language-minority makeup of the particular jurisdiction. As the Washington Post correctly observed in commenting on the prospect of an effects test in Section 2 of the Voting Rights Act, its "logical terminal point" is "that election district lines must be drawn to give proportional representation to minorities" -- essentially the equivalent of quotas in electoral politics.

There is, of course, sharp disagreement over the merits of the proposed amendment to Section 2. The political debate on this critically important subject is not well served, however, when one of the protagonists includes in a national mailing a wildly distorted account of the position of others. In this regard, your letter can be read to suggest not only that the Administration seeks to amend the enforcement provision of Section 2, but also that we seek to "gut" the Section 5 pre-clearance provision of the Act -- the enforcement provision administered by the Justice Department which is at the very heart of the Act. As anyone who has listened to the President and the Attorney General would know, both assertions are false.

The League of Women Voters has a fine reputation as a non-partisan and fair-minded organization. In the hope that some effort can be made to correct the serious misstatements which have been circulated, I am sending you and the League's Directors and Trustees the Attorney General's and my testimony on the Voting Rights Act which sets forth in greater detail the Administration's position. I am also enclosing an article from Commentary magazine discussing the dangers inherent in the modification of Section 2 proposed by the House bill.

Thank you in advance for taking the steps necessary to return the debate on this issue to a discussion grounded on fairly reasoned analysis.

Sincerely,



Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

cc w/Attachments: Directors/Trustees

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL



March 15, 1982

TO: Mr. Schmults
Mr. Reynolds
Mr. McConnell
Mr. Rose
~~Mr. Starr~~
Mr. DeCair
Mr. Roberts
Mr. Cooper

FM: Carolyn B. Kuhl

CBK

RE: Voting Rights

The attached letter from the
League of Women Voters came to me
with a reply envelope for enclosure
of a contribution.

Attachment

RH LWV-917
RUTH HINERFELD

(6743)
WASH DC

(0823-CMS-15B-21)RC

EXPEDITE URGENT REPLY REQ

I'M SENDING THIS ALERT TO YOU AND THOUSANDS OF OTHER CITIZENS WHO HAVE DEMONSTRATED A LONG-STANDING CONCERN FOR EQUAL RIGHTS.

THE VOTING RIGHTS ACT OF 1965 WHICH PASSED THE HOUSE OF REPRESENTATIVES IS STILL THREATENED IN THE SENATE. THE LEAGUE OF WOMEN VOTERS IS MOBILIZING A MASSIVE EFFORT TO RESIST ATTEMPTS TO GUT OR DESTROY THIS HISTORIC LEGISLATION THROUGH ADMINISTRATIVE TECHNICALITIES.

DURING THE PAST TWO DECADES NOTHING HAS HAD HIGHER PRIORITY FOR THE LEAGUE OF WOMEN VOTERS THAN EXTENDING THE RIGHT TO VOTE AND TO PARTICIPATE IN THE POLITICAL PROCESS TO ALL AMERICANS.

MANY CITIZENS FORGET THAT THESE RIGHTS HAVE NOT ALWAYS BEEN GUARANTEED IN OUR LAND -- DESPITE THE PROMISE OF OUR CONSTITUTION AND THE DECLARATION OF INDEPENDENCE.

IT TOOK A STRONG AND VIBRANT SUFFRAGE MOVEMENT TO GUARANTEE WOMEN'S POLITICAL RIGHTS, AND WOMEN ARE STILL FIGHTING FOR THEIR OTHER RIGHTS IN OUR SOCIETY.

AND IT WAS NOT UNTIL RECENTLY THAT MINORITY AMERICANS WERE GUARANTEED THE RIGHT TO VOTE.

WHEN THE VOTING RIGHTS ACT WAS ENACTED IN 1965, MANY ASSUMED THE BATTLE TO BE OVER.

IT IS NOT.

WHILE MANY SAY THAT THEY ARE FOR VOTING RIGHTS, WHAT THEY MEAN BY THAT IS OFTEN MISLEADING. MANY "SUPPORTERS" OF VOTING RIGHTS ARE IN FACT SUPPORTING CHANGES IN THE ACT THAT WOULD GUT ALL ITS ENFORCEMENT PROVISIONS -- THE VERY PROVISIONS WE WORKED SO HARD TO GET IN 1965. INCLUDED RIGHT NOW, UNFORTUNATELY, IN THIS LIST OF "SUPPORTERS" IS THE PRESIDENT OF THE UNITED STATES; STROM THURMOND, CHAIRMAN OF SENATE JUDICIARY COMMITTEE; ORRIN HATCH, CHAIRMAN OF THE SENATE SUBCOMMITTEE DEALING WITH THIS BILL; AND MANY OTHER MEMBERS OF THE UNITED STATES SENATE.

FAILURE TO EXTEND A STRONG VOTING RIGHTS ACT WILL NOT ONLY CURTAIL PARTICIPATION BY MINORITIES IN THE ELECTORAL PROCESS, IT WILL SEND A MESSAGE TO MILLIONS OF MINORITY GROUP MEMBERS THAT AMERICA IS TURNING ITS BACK ON THEM.

SUCH A REACTION IS THE LAST THING AMERICA NEEDS TODAY.

THAT'S WHY THE LEAGUE OF WOMEN VOTERS IS AN IMPORTANT LEADER IN THE CAMPAIGN TO FIGHT FOR PRESERVATION OF THE CURRENT VOTING RIGHTS GUARANTEES.

WE HAVE BEGUN TO RECRUIT ALLIES FROM ALL ELEMENTS OF OUR SOCIETY -- REPUBLICANS AND DEMOCRATS, BUSINESS AND LABOR, CONSERVATIVES AND LIBERALS -- FOR THE NON-PARTISAN FIGHT FOR DEMOCRATIC RIGHTS.

BUT WE NEED YOUR HELP. THE TASK WILL BE DIFFICULT AND ENORMOUSLY EXPENSIVE. WE MUST REACH OUT TO CONCERNED CITIZENS LIKE YOU FOR SPECIAL CONTRIBUTIONS TO HELP THE LEAGUE'S EMERGENCY CAMPAIGN ON VOTING RIGHTS TODAY.

YOUR CONTRIBUTION WILL MAKE IT POSSIBLE FOR US TO MOBILIZE AN EFFECTIVE COALITION TO STOP THE HATCH AND THURMOND PLANS BY LETTING WAVERING SENATORS AND REPRESENTATIVES KNOW THAT MILLIONS OF CONCERNED AMERICANS -- NOT ONLY MINORITIES -- WILL BE WATCHING THEM.

THIS NATION CANNOT AFFORD A RETURN TO THE "STATES RIGHTS VS. CIVIL RIGHTS" BATTLES OF THE PAST.

WE CANNOT AFFORD TO TURN BACK THE CLOCK ON VOTING RIGHTS.

BUT THAT'S EXACTLY WHAT COULD HAPPEN IF WE FAIL TO ACT NOW.

WHEN YOU BECOME A FRIEND OF THE LEAGUE BY HELPING TO SUPPORT OUR EFFORTS IN THIS HISTORIC BATTLE, I WILL SEE TO IT THAT YOU RECEIVE REGULAR COPIES OF THE VOTER, OUR HIGHLY-ACCLAIMED PERIODICAL WHICH WILL KEEP YOU POSTED ON VOTING RIGHTS DEVELOPMENTS AND OTHER KEY ISSUES OF THE DAY.

BUT PLEASE, ACT NOW. THE FIGHT WILL BE A TOUGH ONE. WE DON'T HAVE A MOMENT TO LOSE IN OUR EFFORTS TO BLOCK ATTEMPTS TO DEPRIVE MINORITY AMERICANS OF THEIR HARD-EARNED RIGHTS.

RUTH HINERFELD
PRESIDENT
LEAGUE OF WOMEN VOTERS

Memorandum



Subject

Material To Be Delivered Today To
Senators on Voting Rights Act

Date

February 23, 1982

To Wm. Brad Reynolds
Assistant Attorney General
Civil Rights Division

From John Roberts *JR*

I have suggested minor changes in both the new piece on pre-Mobile law and the old piece "Why Section 2 of the Voting Rights Act Should Be Retained Unchanged." Copies with suggested changes are attached as is a set of supportive letters to the editor, etc.

Please let me have a copy of the cover letter under which these three items are sent out.

cc: ✓ Ken Starr

WHY SECTION 2 OF THE VOTING
RIGHTS ACT SHOULD BE RETAINED
UNCHANGED

Section 2 of the Voting Rights Act of 1965 provides:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color [or membership in a language minority]."

This provision, which is an important part of what has been uniformly described as the most successful civil rights law ever enacted, is applicable nationwide. Unlike §5 of the Act, §2 is a permanent provision which does not expire in August, so no action is necessary to continue its protections. President Reagan, in endorsing extension of the preclearance provisions of §5, has also urged retention of §2 without any change.

The bill recently passed by the House, however, does not continue §2 unchanged, but rather amends that provision by striking out the phrase "to deny or abridge" and substituting the phrase "in a manner which results in denial or abridgement of". There are several reasons why this change is unacceptable.

1. Like other civil rights protections, such as the Fourteenth Amendment's equal protection guarantee, §2 in its historic form requires proof that the challenged voting law or procedure was designed to discriminate on account of race. This "intent test" follows logically and inexorably from the nature of the evil that §2 was designed to combat. Both the Fifteenth Amendment and §2, which implements the constitutional protection, establish this Nation's judgment that official actions in the area of voting ought not be taken on the basis of race. As the Supreme Court recently made clear in City of Mobile v. Bolden, 446 U.S. 55 (1980), decisions that are proved to have been made on that prohibited basis -- i.e., with the intent to affect voting rights because of race -- must fall.

The House bill would alter §2 dramatically by incorporating in that provision a so-called "effects test". Under the House bill, the inquiry would focus not on whether the challenged action was taken with discriminatory purpose, but rather on whether the "results" of an election adversely affect a protected group.

lead to
election
results which
mirrored
the
population
make-up of
the
particular
jurisdiction

achieve
election
results
reflecting
the racial
balance
of the
jurisdiction.

By measuring the statutory validity of a voting practice or procedure against election "results," the House-passed version of §2 would in essence establish a "right" in racial and language minorities to electoral representation proportional to their population in the community. Any election law or procedure that did not ~~maximize the voting strength of a racial or language minority, as determined by election "results"~~ could be struck down as being impermissibly "dilutive" or "retrogressive" -- based on court decisions under §5 of the current Act (which does include an "effects" test). Historic and common political systems incorporating at-large elections and multi-member districts would be vulnerable to attack. So, too, would redistricting and reapportionment plans, unless drawn to ~~maximize the voting strength of protected groups even if at the expense of other equally identifiable and affected groups~~. The reach of amended §2 would not be limited to statewide legislative elections, but would apply as well to local elections, such as those to school boards and to city and county governments.

As Justice Stewart correctly noted in his opinion in City of Mobile v. Bolden, incorporation of an effects test in §2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies. Such a result is fundamentally inconsistent with this Nation's history of popular sovereignty.

2. Proponents of the House bill attempt to counter this argument by citing a "savings clause" in §2, which provides that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation" (emphasis supplied). By its terms, however, this provision removes from the §2 prohibition only those election systems that are neatly tailored to provide protected groups an opportunity to achieve proportional electoral success (i.e., single-member districts drawn to maximize minority voting strength). In circumstances where the racial group failed to take advantage of the political opportunity provided by such an election system (by refraining, for example, from running any candidates for office), the resulting disproportionate electoral representation would not, in such a situation, be fatal under the House bill, since that single consequence is not, "in and of itself," sufficient to make

out a violation. If, on the other hand, the challenged electoral system is not structured to permit proportional representation, (such as the common at-large and multi-member district election systems), the so-called savings clause is to no avail. The "results" test in §2 of the House bill would effectively mandate in such circumstances an electoral restructuring (even on a massive scale) so as to allow achievement of proportional representation if the particular racial or language group so desires.

3. Proponents of the amendment also claim that intent is virtually impossible to prove. This argument is simply false. The Supreme Court has made clear that intent in this area, like any other, may be proved by both direct and circumstantial evidence. A so-called "smoking gun" (in terms of actual expressions of discriminatory intent by members of the legislature) is simply not necessary. Plaintiffs can rely on the historical background of official actions, departures from normal practice, and other indirect evidence in proving intent. In this regard, the Voting Rights Act as currently written stands on the same footing as most other federal constitutional and statutory provisions in the civil rights area. Proof of wrongful intent as an element of the legislative offense is the rule -- not the exception. Adherence to that traditional standard in the present context is all the more compelling when one recalls that §2 is intended to be coextensive with the Fifteenth Amendment, which safeguards the right to vote only against purposeful or intentional discrimination on account of race or color.

Moreover, violations of §2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes. The district court judge in the Mobile case, for example, acting solely on the basis of perceived discriminatory "effects", struck down the city's three-member, at large commission system of government, which had existed in Mobile for 70 years. In its place the federal judge ordered a mayoral system with a nine-member council elected from single-member districts. It would be difficult to conceive of a more drastic alteration of local governmental affairs, and under our federal system such an intrusion should not be too readily permitted.

4. Section 2 in its present form has been a successful tool in combatting racial discrimination in voting. The House in its hearings on extension of the Voting Rights Act failed to make the case to support a change in the existing "intent" standard. Significantly, no testimony was offered as to election practices in non-covered jurisdictions to

The House Report itself conceded that "no specific evidence of voting discrimination in areas outside those presently covered was presented."

in those covered jurisdictions

The House bill

indicate a need to introduce a nationwide "results" test in §2. When Congress decided in 1965 to depart from the "intent" standard embedded in the Fifteenth Amendment and to adopt an "effects" test for §5 as a ~~temporary~~ ^{remedial} measure for specifically identified covered jurisdictions, it based that legislation on a comprehensive congressional record of abuses of minority voting rights. The Supreme Court upheld the constitutionality of such legislation because a basis for such drastic special remedial measures had been fully demonstrated. ~~It~~ seeks some seventeen years later to impose a similar "effects" standard nationwide on the strength of a record that is silent on the subject of voting abuses in non-covered jurisdictions. This is not only constitutionally suspect, but also contrary to the most fundamental tenants of the legislative process on which the laws of this country are based.

The House bill would also apply the effects test on a permanent basis and to existing election systems and practices as well as changes. Such an effort.

In addition it applied the effects test only on a temporary basis and only to election law changes.

Attachment P

Statutory and Case Law Regarding
Multi-Member Election Districts

Prior to the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980), Sec. 2 of the Voting Rights Act did not play a major role in cases charging that multi-member electoral districts discriminated on account of race. The United States relied on Sec. 2 to give it authority to sue (see, e.g., U.S. v. Uvalde Consol. I.S.D., 625 F.2d 547 (5th Cir. 1980), cert. denied, ~~(May 18, 1981)~~ 451 U.S. 1002 ⁽¹⁹⁸¹⁾) and private plaintiffs coupled Sec. 2 claims with claims of unconstitutional discrimination. But no court has ever relied on Sec. 2 as a ground for relief against multi-member districts. 1/

1/ Of the few appellate court opinions which address claims under Sec. 2 of the Voting Rights Act, only three antedate the Supreme Court's decision in Mobile. One was the Fifth Circuit's decision in Mobile, 571 F.2d 238, 242 n.3 (5th Cir. 1978) (the plaintiffs' Sec. 2 claim "was at best problematic; this court knows of no successful dilution claim expressly founded on * * * [Sec. 2].") Neither of the others was a dilution case. Toney v. White, 476 F.2d 203, 207, modified and aff'd en banc, 488 F.2d 310 (5th Cir. 1973), involved relief based on an official's purge of blacks from the voter rolls, conduct held to violate both Sec. 2 and the Fifteenth Amendment.

United States v. St. Landry Parish School Board, 601 F.2d 859, 865-866 (5th Cir. 1979), pertained to a vote-buying scheme ~~affecting~~ ^{involving} black voters. Other decisions in suits based in part upon Sec. 2 did not discuss Sec. 2. Coalition for Education v. Board of Elections, 495 F.2d 1090 (2d Cir. 1974) (successful challenge by minority race voters to school board election in New York City); Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977) (unsuccessful challenge to at-large system for electing the Boston School Committee); and United States v. East Baton Rouge Parish School Board, 594 F.2d 56 (5th Cir. 1979) (reversing the dismissal of suit attacking the use of multi-member wards).

Four post-Mobile Fifth Circuit cases discuss the application of Sec. 2 to dilution claims. United States v. Uvalde ~~ISD~~, 625 F.2d 547 (5th Cir. 1980), cert. denied, 451 U.S. 1002 ~~(May 18, 1981)~~. (United States' authority under Sec. 2 to challenge discriminatory multi-member school board electoral system) McMillian v. Escambia County, 638 F.2d 1239, 1242, n.8, 1243 n.9 (5th Cir. 1981) (Sec. 2 and the Fifteenth Amendment do not cover vote dilution); Lodge v. Buxton, 639 F.2d 1358, 1364 n.11 (5th Cir. 1981), prob. jurs. noted

(continued)

Thus, it is clear that the controversy over Mobile does not relate to enforcement of Sec. 2, but instead concerns whether Mobile has radically altered the pre-existing case law under the Fourteenth and Fifteenth Amendments. The Supreme Court's first review of the contention that multi-member districts discriminated against blacks was in Whitcomb v. Chavis, 403 U.S. 124 (1971). There the district court had struck down the legislative multi-member district in Marion County, Indiana because it found the scheme had a discriminatory effect. ^{2/} However, the Supreme Court reversed, holding that there is no right to proportional representation and noting that there was no suggestion that the multi-member districts in Indiana "were conceived or operated as purposeful devices to further racial or economic discrimination." The Court discussed at length various ways of proving intentional discrimination, including discrimination in voter registration and exclusion from party slates. Thus, Whitcomb (a) rejected the effects test; (b) applied the purpose test; and (c) gave some guidance as to the proof necessary to sustain a constitutional challenge to at-large elections.

The only other pre-Mobile Supreme Court decision directly on the subject is White v. Regester, 412 U.S. 755 (1973), in which the Court upheld a finding that multi-member districts in Bexar and Dallas Counties, Texas, unconstitutionally discriminated on account

1/ (continued)

sub nom. Rogers v. Lodge, ____ U.S. ____ (Oct. 5, 1981) (Mobile establishes that Sec. 2 does not provide a remedy for conduct that does not violate the Fifteenth Amendment); Kirksey v. City of Jackson, 663 F.2d 659, 664/665 (5th Cir. 1981) (rejecting assertion that Sec. 2 goes beyond the Fifteenth Amendment and prohibits practices that perpetuate the effects of past discrimination). See also fn. 6, infra.

2/ Specifically, the district court "thought [poor Negroes] unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts." 403 U.S. at 148-149.

of race and national origin. While the case has been pointed to as embracing an effects test, the Court explicitly began its analysis by emphasizing that "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." 412 U.S. at 766. As to Dallas County, the Court held that the district court findings of a history of official discrimination against blacks, the use of electoral devices which enhanced the opportunity for racial discrimination, the discriminatory exclusion of blacks from party states, and the use of anti-black campaign tactics demonstrated a violation of the rule of Whitcomb v. Chavis. 412 U.S. at 766-767. As to Bexar County the Court again found "the totality of the circumstances" supported the district court's view "that the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life" 412 U.S. at 769. It is true that the opinion of Justice White, for the Court, refers on several occasions to "the impact" of the practices, but nowhere does the opinion intimate that impact alone was enough. Rather, the Court examined impact as one of several pieces of circumstantial evidence of "invidious discrimination." 3/

Thus, although Washington v. Davis, 426 U.S. 229 (1976) is often cited as the genesis of the purpose test in racial discrimination cases brought under the Constitution, Washington simply is a continuation of a settled line of Supreme Court decisions. Indeed, Washington relies not only upon cases involving purposeful discrimination in schools and jury selection, but also on Wright v. Rockefeller, 376 U.S. 52 (1964), in which the Supreme Court had applied a purpose standard to a claim of racial discrimination in drawing legislative district lines. While Washington expressly disapproved certain other cases which appeared to have relied solely on an effects test, it did not disapprove Whitcomb, White, or lower court cases which had followed them, ^{for the simple reason that those cases did not embody an effects test.}

3/ Justice White, himself, agreed in his dissenting opinion in Mobile that White v. Regester was a case in which indirect evidence supported an "inference of purposeful discrimination." 446 U.S. at 103. He simply disagreed with the Mobile plurality's assessment of the evidence regarding purpose in Mobile.

Zimmer did not address section 2.

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The decision-making in the lower courts followed a similar course. The leading cases were decided in the Fifth Circuit. From 1973 to 1978 the controlling Fifth Circuit case was Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). 4/ That case set out a series of evidentiary factors for determining whether a multi-member district is unconstitutionally discriminatory under the rule of Whitcomb and White. While that opinion does exhibit some confusion as to whether purpose or effect or both are at issue (see, e.g., 485 F.2d at 1304 and fn. 16), the court stressed that "it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305. The court characterized the issue as whether the evidence shows unconstitutional "dilution" of the vote of minority members, thus ~~seemingly~~ sidestepping any debate about whether a purpose test or an effects test applies. 5/

did,
however,

4/ The affirmance was without consideration of the constitutional issue.

5/ The court borrowed most of the "Zimmer" factors from Whitcomb and White. The court said:

where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305.

When the Zimmer rule was challenged by Mobile and other jurisdictions with multi-member districts the Fifth Circuit thoroughly discussed the Zimmer factors in light of Washington v. Davis. In a companion case to Mobile the Fifth Circuit explained that:

. . . Washington v. Davis . . . requires a showing of intentional discrimination in racially based voting dilution claims founded on the Fourteenth Amendment. We concluded also that the case law requires the same showing in Fifteenth Amendment dilution claims. Moreover, we demonstrate that the dilution cases of this circuit are consistent with our holding in this case. In particular, we read Zimmer as impliedly recognizing the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination

Nevett v. Sides, 571 F.2d 209 (8th Cir. 1978). Based on these standards the Fifth Circuit held that the district court's findings in Mobile "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the Fourteenth Amendment." Bolden v. City of Mobile, 571 F.2d 238, 245 (5th Cir. 1978). 6/

Thus, when Mobile reached the Supreme Court both the Fifth Circuit and prior Supreme Court cases accepted the proposition that discriminatory intent is a necessary element of a claim that multi-member districts violate the Constitution. The plurality opinion of Justice Stewart in Bolden did not reject Whitcomb or White; indeed, it did not fully reject Zimmer. Rather, the plurality relied heavily on Whitcomb and White and argued that those decisions were consistent with Washington v. Davis. See, e.g., 446 U.S. at 65-69. As to Zimmer, Justice Stewart thought that it reflected a misunderstanding that discriminatory effect alone violated the Fourteenth Amendment (id. at 71), but nonetheless

6/ The court noted that it knew "of no successful dilution claim expressly founded on" Sec. 2 of the Voting Rights Act. 571 F.2d at 242, fn. 3.

agreed that "the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose" Id. at 73. However, Justice Stewart thought that the lower courts had treated the Zimmer criteria mechanically, failing to follow the approach of governing precedents ^{7/} to determining whether there was discriminatory intent. Further, the lower courts had failed to specify whose intent was at issue. However, it is important to note that Justice Stewart did not conclude that Mobile's multi-member system was non-discriminatory, ^{8/} but merely sent the case back to the lower courts to reevaluate it pursuant to proper standards.

As we see it, Mobile is not a sharp departure from the case law of the past twenty years, but is an application of a consistent line of cases holding that indirect evidence may make out a showing that the adoption or maintenance of a multi-member district is unconstitutional because based on purposeful discrimination. The issues in Mobile were what kind of indirect evidence and whose intent. We recognize that the Mobile case places a burden of proof on the plaintiff, but so did its predecessor cases. The burden is a manageable one, which does not require "smoking gun" evidence, but does require a sensitive and careful sorting of circumstantial evidence. In the Mobile case on remand the United States has argued that the evidence meets the standards articulated by Justice Stewart's plurality opinion.

✓ The one change resulting from Mobile is that the rigid criteria of Zimmer are no longer controlling in the Fifth Circuit, though they continue to be pertinent. Perhaps the temporary result is a lack of precision and clarity as to what constitutes adequate proof of discriminatory intent. However, this is one area in which the courts may be better able than Congress to evolve standards.

^{7/} For example, Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977), had provided detailed guidance as to factors lower courts should consider in deciding whether governmental action had been taken with discriminatory intent.

^{8/} He said "whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say." 446 U.S. at 75, fn. 21.

2-18-82

DATE

Letters

The New York Times

PAGE

The Right to Vote Must Not Be a Right to Win

To the Editor:

Frank R. Parker's Op-Ed article of Feb. 5, "Saving Voting Rights," is a sample of the sophistry by which the "effects" test in the new Voting Rights Act will be defended.

Contrary to Mr. Parker's suggestion, determination of intent is not a matter of psychoanalysis, nor is it particularly difficult. Juries decide every day of the week whether a killing was premeditated or done in some other state of mind, and they do so without telepathy or smoking guns.

Indeed, the very idea of "discrimination" is that of an act done by the will of a rational being. A person can no more inadvertently discriminate than he can inadvertently rob.

And Mr. Parker's disavowals notwithstanding, to forbid "discriminatory effects" does lead down the slippery slope to electoral quotas. Effects tests have certainly done so in employment, despite the promises of proponents of the Civil Rights Act.

To say that disproportional representation is not "in and of itself" a violation is a transparently weak safeguard, since any further factor, however insubstantial and unrelated to anyone's intent to discriminate, is now admissible as the decisive factor.

The right to vote is indeed our "crown jewel." It is the right not to be interfered with in the exercise of the franchise, and it has no reference to election results. If no one stops you from voting, your right is intact, even if your candidate, or the candidate representing your racial group, regularly loses.

This is the merest common sense, as reaffirmed in *Mobile v. Bolden*. The change Mr. Parker advocates would turn the right to participate in an election into a presumptive right to win, and it would wholly pervert the democratic process.

MICHAEL I. VIN

Professor of Philosophy, City College
New York, Feb. 6, 1982

To the Editor:

Frank Parker's article is typical of the desultory debate which has accompanied the attempt to amend Section 2 of the Voting Rights Act. The City of Mobile case has not, as Parker contends, "drastically altered" the intent standard of the current Section 2.

A successful claim under the 15th Amendment has always been conditioned upon a showing of discriminatory intent. Justice Stewart cited a venerable line of cases in support of this contention; these cases routinely invalidated voting practices or procedures that were racially neutral on their face but could be traced to a "discriminatory intent."

In no case did this entail the necessity of finding a "smoking gun" or the psychoanalytical analysis of legislators' intention. The intent that says it is necessary to do so has been created out of whole cloth by those who seek to create a radical new standard for the Voting Rights Act.

The great concern — and one which I share — is that the proposed amendment of the Voting Rights Act will lead to the requirement of proportional representation based on race. The language of the amendment seeks to dispel this fear, but its assurances ring hollow: lack of proportionality "in and of itself" does not constitute a violation.

In most recent years, emphasis has shifted from the issue of equal access to the ballot for racial minorities to that of equal results. The issue is no longer typically conceived of in terms of the right to vote but in terms of the right to an effective vote.

The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.

But if results become the new standard by which equal access to the political process is tested (as the amendment of Section 2 explicitly demands), then proportionality is inevitable. The argument, in its simplest form, presumes that a political process "equally open" to minorities will produce proportional results. When faced with a lack of proportional results, it is merely assumed that the political process is not "equally open."

All sides agree that the Voting Rights Act has been remarkably successful and that the imposition of the standard of racial proportionality would undo much of that success. The burden of proof rests upon those who would drastically alter the standards of intent to demonstrate more persuasively than they have that the amendment of Section 2 will not create the very thing that everyone wishes to avoid.

EDWARD J. ERLER
Research Triangle Park, N.C., Feb. 10, 1982
The writer is a scholar in residence at the National Humanities Center.

The Voting Rights Act Works As Is

By editorial comment ("Voting Rights: Be Strong," Jan. 26), The Post urged endorsement of the House-passed amendment to Section 2 of the Voting Rights Act, which changes the standard for determining a violation from the current "intent" test to one that requires only a showing of discriminatory "effect." Remarkably, the case made for this position was that the House bill merely seeks to reinstate the standard in use before the Supreme Court decision in *City of Mobile v. Bolden*.

In the 1980 *Mobile* decision, the Supreme Court considered Section 2 of the Voting Rights Act for the first time and concluded that proof of discriminatory "intent" is necessary to establish violations of that provision. Contrary to The Post's editorial, this decision signaled no change in the law.

The act itself is unambiguous on this point. As Justice Potter Stewart observed in *Mobile*, Section 2 was enacted to enforce the guaranty of the Fifteenth Amendment, and that constitutional provision has always required proof of discriminatory intent. Had Congress intended to include in Section 2 an "effects" test, it certainly knew how; in 1965, and again in 1970 and 1975, Congress explicitly included an "effects" test in Section 5 of the Voting Rights Act (applicable only to selected jurisdictions), but chose not to put the same standard in Section 2 (applicable nationwide).

Nor have the courts suggested otherwise. The Post points to two decisions (*Whitcomb v. Chavis* and *White v. Regester*) in support of its claim that an "effects" test did in fact exist in

Section 2 before the *Mobile* decision. Neither case, however, even involved Section 2 of the Voting Rights Act; rather, they both concerned claims brought under the Equal Protection Clause of the Fourteenth Amendment. Moreover, even on the Fourteenth Amendment question, both *Whitcomb* and *White* tacitly recognized that proof of discriminatory intent is a necessary element of the constitutional offense. Justice Stewart's opinion in *Mobile* makes this clear, and The Post's editorial suggestion to the contrary is simply legally incorrect.

Also unsound is The Post's assertion that discriminatory intent is "virtually impossible" to prove. Several Supreme Court decisions have made it abundantly clear that a "smoking gun" in the form of incriminatory statements or documents has never been required. Intent in this area, as in any other, may be proved by circumstantial and indirect evidence. Notably, the equal protection clause of the Fourteenth Amendment, responsible for so many historic civil rights advances, has a similar test.

There is a general consensus in this country that the temporary provisions of the Voting Rights Act should be extended for an additional period of time. Congress should not, however, introduce uncertainty and confusion into what has been the most successful piece of civil rights legislation ever enacted by making so dramatic a change in its permanent provisions. Section 2 therefore should be retained without change.

WILLIAM BRADFORD REYNOLDS
Assistant Attorney General
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Washington

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REVIEW & OUTLOOK

Voting Wrongs

New amendments to the Voting Rights Act of 1965 are up for Senate hearings this week and we wonder if the subcommittee on the Constitution will notice that they have a strange little quirk: In the name of protecting the right to vote they expand federal power to outlaw local elections. The contradiction escaped notice in the House, which already has passed the amendments.

This seems to be a case of Congress not knowing where to stop. The act, originally designed to overcome systematic denial of access to the polls in certain Southern states, has largely accomplished its purpose. In Mississippi, for example, 67% of the eligible blacks are registered, a tenfold increase from 1965. But in 1975 the law was expanded beyond the South and extended to "language minorities" as well. Today, because of "trigger mechanisms" that invoke the law where rights violations are suspected, all voting districts in nine states and some in 13 others are required to "preclear" with the Justice Department any proposed changes in election procedures. Thirty states are required to provide bilingual election material and assistance.

Around 35,000 proposed election law changes have been submitted to the Justice Department since 1965. Of those, Justice refused to allow 811, the bulk of which involved alleged reductions in "minority" voting power through districting changes and use of at-large as opposed to district representation. In some cases, Justice has blocked elections; New York City, for example, has yet to hold its 1981 City Council elections because of a redistricting dispute with Washington.

In only about a tenth of these cases did Justice find any "intent" to discriminate; in the rest, under the act's strict "preclearance" test, it merely found that the proposed changes would have a discriminatory "effect." This "effects" test currently applies only to those states and localities which had a history of intentional discrimination or disproportionate voting patterns.

The Supreme Court has ruled that in other parts of the country the government must first prove "intent" to discriminate before it can apply the provisions of the act. Moreover, in upholding Mobile, Alabama's at-large

voting system in 1980, the Court said that some existing election practices may result in low representation of minorities among elected officials but that doesn't itself constitute "purposeful" discrimination. "The 15th Amendment," it added, "does not entail the right to have Negro candidates elected."

The House amendments to Section 2 of the Voting Rights Act would depart dramatically from the Court's logic. The federal government would no longer have to prove "intent" to discriminate in elections. It could merely cite voting practice "results" in alleging discrimination. The amendments would obligate the Justice Department to review elections in every state and municipality in the nation and to look not only at proposed changes in procedures but also at every existing election law. The biggest target would likely be the at-large system of voting used in two-thirds of the moderate-size municipalities in the U.S.

Now, the at-large system isn't perfect, but it does have certain merits and, indeed, has often been adopted in reform movements. For one thing, it makes it impossible for incumbents to hang onto their seats through redistricting.

We learned a long time ago that when you allow the Feds to assess "results," they end up doing it by essentially racist methods, dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative. Somehow this doesn't strike us as the way we should be moving if we are trying to remove the vestiges of racism in American society. Moreover, we don't find it comforting that the result so far of many disputes between the Feds and the local authorities often has been to suspend elections, disfranchising voters and allowing the incumbents to stay in power.

The amendments the Senate will vote on soon should be scrubbed in favor of a return to the intent test and a planned phase-out of the Voting Rights Act altogether as it becomes increasingly evident that no one is being kept from the polls because of his race, creed or color. Otherwise, we will end up with more, not less, racial and ethnic polarization.

1-21-82

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Los Angeles Times

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Voting Rights and Bloc Power

Proposed Bill Chips Away at the Notion of Majority Rule

By JOHN H. BUNZEL

The U.S. Senate is about to begin hearings on extending the Voting Rights Act of 1965. President Reagan and most members of Congress agree that the landmark law, which was extended and expanded in 1970 and 1975, should be extended for 10 more years. But a real fight is shaping up over how to go about it.

One of the major issues involves the "intent-effects" distinction drawn by the U.S. Supreme Court that the House-passed voting-rights measure is seeking to overturn. Section 2 of the act, which is applicable nationwide, protects all citizens from having their right to vote denied or abridged on the basis of race or color. It has traditionally been understood to mean, and was reaffirmed by the Supreme Court in 1980, that a violation of that law requires a demonstration of intention or a discriminatory purpose. The court has also ruled that only if there is "purposeful discrimination" can there be a violation of the equal-protection clause of the 14th Amendment.

The House-passed measure would change the standard of proof for Section 2 lawsuits by eliminating the requirement that an electoral jurisdiction has intentionally discriminated in voting laws. Instead, it need only act "in a manner that results in a denial or abridgment" of voting rights. The House proposes a standard for identifying discrimination that looks to the racial "effects" or "disparate impact" of some particular action on blacks or other minorities rather than on whether or not the action was undertaken for an illegal purpose.

It would go beyond the existing standard that covers specified jurisdictions with histories of electoral discrimination (mostly in the South) and bans all election practices—gerrymandering election districts, for example—that prevent minorities from enhancing their political power. The proposed legislation would change the right of minorities to vote to an effective right to vote. In short, not only should blacks and Latinos

have the right to select black and Latino candidates—an unarguable right—but also blacks should have the maximum political opportunity to be represented by blacks and Latinos by Latinos.

The presumption is that minorities will be able to increase their political strength and influence only if Congress changes Section 2 of the Voting Rights Act so that blacks and Latinos have more than equal access to the ballot box. They must somehow be assured of equal electoral results. The center of concern would move from eliminating racially motivated discrimination in the voting process to endorsing a theory of group representation that would push our politics closer to institutionalizing a system of single-member districts and racial-bloc voting.

This, it is claimed, is the only way to make sure that the black or Latino vote is not diluted, and that every ethnic group is "fully represented." What worries many observers is that it is only a short step to sanctioning the concept of proportional racial and ethnic representation.

Thus, as Nathan Z. Dershowitz and Marc D. Stern of the American Jewish Congress point out, a law designed to guarantee full minority participation in the democratic process can also undermine a major tenet of that process—majority rule. "What is worse, it does so by insisting that racial considerations be used to dictate election results."

It is in this light that one must weigh carefully the implications of new language in the House-passed measure, which says that the fact that members of a minority group have not been elected "in numbers equal to the group's proportion of the population" shall not constitute a violation of Section 2 "in and of itself." That is the key phrase—and the sleeper. It calls to mind the difference between quotas and goals in affirmative action. Proportional representation may be wrong, but the "effects" test is

said to be right and necessary in much the same way that engaging in racially preferential treatment is claimed to be the right remedy for past discrimination.

A more fundamental problem involves the kind of representation to which blacks and other minorities are entitled. Consider a Western state that has a 30% black population but only 15 black state senators out of 100. By itself, this "disproportionate representation" would not violate Section 2. But it could serve as a trigger mechanism. The Justice Department could take a look at the discrepancy in registration figures between blacks and whites, or the disparity in state funds between black and white educational facilities, or the maldistribution of public services, and claim that any one of these additional factors constitutes that scintilla of evidence to make a violation stick.

Furthermore, the "effects" test would permit this kind of evidence in order to "prove" that Section 2 had been violated. By contrast, all factors and circumstances would have to be examined together, as a total package, to satisfy the standard of purposefully discriminatory intent.

Those who have been long-time friends of civil rights are not suddenly enemies simply because they do not favor an electoral system that would shield a black candidate running for office from a white candidate, or because they do not believe that elected officials of one race cannot represent the interests of another. They continue to support the original aims of the Voting Rights Act because they remain committed to working toward an integrated political process rather than toward the goal of black or Latino power that, they feel strongly, is not the true test of electoral equality.

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VRA Op-Ed Piece

VOTING RIGHTS ACT

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Congress is currently considering the critical question of whether to extend the Voting Rights Act of 1965. That Act must be extended. And it should be extended in its tried and true form -- neither contracted nor expanded to meet unsubstantiated contentions. That simple and straightforward position -- to extend the Act as is -- is President Reagan's position.

Unfortunately, the debate on this vital issue -- both in the press and the Congress -- has been plagued by massive misperceptions and mischaracterizations. There is a disturbing effort afoot to derail the dispassionate consideration of these issues by branding anyone who does not support a bill recently passed by the House of Representatives as opposed to the Voting Rights Act itself and, very likely, a racist as well. The House bill, however, is not the Voting Rights Act, but something very different. The differences must be carefully considered on their merits. The issues are too significant to be buried in the rhetoric and disingenuous accusations of those who, for political reasons, seek to cloud rational discussion with false charges of racism.

In 1965 when Congress enacted the Voting Rights Act it banned outright certain practices used to discriminate against blacks, such as poll taxes and literacy tests. Section 2 of the Act provided a permanent, nationwide protection of the right to vote. Recognizing that there had been widespread abuses of this right in certain jurisdictions, Congress took the additional step in section 5 of temporarily requiring those jurisdictions to "preclear" election law changes with a federal court or the Attorney General. Congress explicitly provided in section 5 that changes which were required to be precleared should be disapproved not only if they were based on a discriminatory intent -- the test in section 2 -- but also if they had a discriminatory effect. Thus, the existing Voting Rights Act does contain an effects test, but only for a temporary period, only for election law changes, and only in specific jurisdictions where Congress found a compelling need based on a history of abuse.

The Act has been extended twice before and has been extraordinarily successful in its present form. When the question of extension was being considered last spring and summer, the focus was almost exclusively on section 5 -- the provision which was due to expire. The view expressed by numerous civil rights groups during discussions with me was that the Act was the most successful civil rights law ever enacted and should be extended unchanged.

The President has adopted that position. He favors extension of the existing Act for another 10 years, longer than any previous extension voted by Congress, with an appropriate bailout provision. He supports retention of the pre-clearance requirements in section 5, including the "effects test" for election law changes in the covered jurisdictions.

But the House bill, instead of extending the existing and effective Act, would dramatically change it. In my judgment there is inadequate understanding of the significance of the changes.

The most drastic amendment is in section 2, a permanent provision requiring no change. As the 1980 Supreme Court decision in Mobile v. Bolden explained, a violation of section 2 -- like violations of other civil rights laws and the Fourteenth Amendment's constitutional guarantee of equal protection -- must be premised on proof of discriminatory intent. The House bill would overturn this settled rule of law and provide that a violation may be established by proof of mere "results" or "effects" -- the test now found only in the special provisions of section 5.

When it enacted the effects test for section 5 in 1965, Congress applied it on a temporary basis, only to election law changes, and only to selected jurisdictions with a clear history of voting abuses. The House proposal to amend section 2 would establish this test on a permanent basis, apply it to all existing election systems and practices as well as proposed changes, and extend it nationwide. It would do so without any evidence of abuses to justify such a dramatic change or a showing of any evil to be cured. Even the House Report itself recognized that "no specific evidence of voting discrimination in areas outside those presently covered was presented."

Under an intent test such as that now in section 2, a plaintiff must prove that the challenged practice was established or applied for the purpose of discriminating on the basis of race. The effects test in the House bill, on the other hand, would focus on election results. The test would be triggered whenever election results did not mirror the population mix of a particular community, and could gradually lead to a system of proportional representation based on race or language status -- essentially a quota system for electoral politics. Elections across the Nation at every level of government -- from school boards and county commissions to the legislature -- could be disrupted by litigation. Election results and district boundaries would be held in suspense while courts struggled with the new law. It could be years before the vital electoral process regained stability.

More fundamentally, a system of proportional representation is inconsistent with the democratic traditions of our pluralistic society. The House bill is based on and would foster the abhorrent notion that blacks can only be represented by blacks and whites can only be represented by whites, a notion that promotes polarization along racial lines.

If proportional representation were not achieved simply because no candidate from a particular racial or language group chose to run, or a similar reason, the House bill would not be violated because of the so-called "savings clause", which provides that "the fact that members of a minority group have not been elected in numbers equal to that group's proportion of the population shall not, in and of itself, constitute a violation." This clause, however, would save nothing else, and would not prevent drastic restructuring of election systems to facilitate achievement of proportional racial representation in state and local governments across the country.

Proponents of the House bill claim that an effects test is necessary because intent is "impossible" to prove. This is simply false. The Supreme Court has made clear on several occasions, for example in the Arlington Heights case, that a "smoking gun" is not required to prove intent. Circumstantial and indirect evidence -- including evidence of effects -- can be relied upon in proving a violation.

Supporters of the House bill also claim that they are merely reinstating Congress' original intent, which was disturbed by the Mobile v. Bolden decision. This also is untrue. Mobile v. Bolden did not change the law in any way. Section 2 has had an intent test since it was enacted in 1965. This is clear from a simple examination of the statute itself. When Congress intended to apply an effects test, as in section 5, it explicitly did so, using the word "effect." It did not do so in section 2. As Justice Stewart demonstrated in his scholarly opinion in Mobile v. Bolden, section 2 was drafted to enforce the protection of the right to vote in the Fifteenth Amendment, which has always required proof of intent. The intent test is the rule in the civil rights area, not the exception. The equal protection clause of the Fourteenth Amendment, for example, under which so many historic civil rights advances have been made, has the same intent test.

This Administration wholeheartedly supports a ten-year extension of the Voting Rights Act in its present form. The Act is not broken, so there is no need to fix it. It should be extended as is.

Intent/Effects Test

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WHY SECTION 2 OF THE VOTING
RIGHTS ACT SHOULD BE RETAINED
UNCHANGED

Section 2 of the Voting Rights Act of 1965 provides:

"No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color [or membership in a language minority]."

This provision, which is an important part of what has been uniformly described as the most successful civil rights law ever enacted, is applicable nationwide. Unlike §5 of the Act, §2 is a permanent provision which does not expire in August, so no action is necessary to continue its protections. President Reagan, in endorsing extension of the preclearance provisions of §5, has also urged retention of §2 without any change.

The bill recently passed by the House, however, does not continue §2 unchanged, but rather amends that provision by striking out the phrase "to deny or abridge" and substituting the phrase "in a manner which results in denial or abridgement of". There are several reasons why this change is unacceptable.

1. Like other civil rights protections, such as the Fourteenth Amendment's equal protection guarantee, §2 in its historic form requires proof that the challenged voting law or procedure was designed to discriminate on account of race. This "intent test" follows logically and inexorably from the nature of the evil that §2 was designed to combat. Both the Fifteenth Amendment and §2, which implements the constitutional protection, establish this Nation's judgment that official actions in the area of voting ought not be taken on the basis of race. As the Supreme Court recently made clear in City of Mobile v. Bolden, 446 U.S. 55 (1980), decisions that are proved to have been made on that prohibited basis -- i.e., with the intent to affect voting rights because of race -- must fall.

The House bill would alter §2 dramatically by incorporating in that provision a so-called "effects test". Under the House bill, the inquiry would focus not on whether the challenged action was taken with discriminatory purpose, but rather on whether the "results" of an election adversely affect a protected group.

By measuring the statutory validity of a voting practice or procedure against election "results," the House-passed version of §2 would in essence establish a "right" in racial and language minorities to electoral representation proportional to their population in the community. Any election law or procedure that did not maximize the voting strength of a racial or language minority, as determined by election "results", could be struck down as being impermissibly "dilutive" or "retrogressive" -- based on court decisions under §5 of the current Act (which does include an "effects" test). Historic and common political systems incorporating at-large elections and multi-member districts would be vulnerable to attack. So, too, would redistricting and reapportionment plans, unless drawn to maximize the voting strength of protected groups -- even if at the expense of other equally identifiable and affected groups. The reach of amended §2 would not be limited to statewide legislative elections, but would apply as well to local elections, such as those to school boards and to city and county governments.

As Justice Stewart correctly noted in his opinion in City of Mobile v. Bolden, incorporation of an effects test in §2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies. Such a result is fundamentally inconsistent with this Nation's history of popular sovereignty.

2. Proponents of the House bill attempt to counter this argument by citing a "savings clause" in §2, which provides that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation" (emphasis supplied). By its terms, however, this provision removes from the §2 prohibition only those election systems that are neatly tailored to provide protected groups an opportunity to achieve proportional electoral success (i.e., single-member districts drawn to maximize minority voting strength). In circumstances where the racial group failed to take advantage of the political opportunity provided by such an election system (by refraining, for example, from running any candidates for office), the resulting disproportionate electoral representation would not, in such a situation, be fatal under the House bill, since that single consequence is not, "in and of itself," sufficient to make

out a violation. If, on the other hand, the challenged electoral system is not structured to permit proportional representation, (such as the common at-large and multi-member district election systems), the so-called savings clause is to no avail. The "results" test in §2 of the House bill would effectively mandate in such circumstances an electoral restructuring (even on a massive scale) so as to allow achievement of proportional representation if the particular racial or language group so desires.

3. Proponents of the amendment also claim that intent is virtually impossible to prove. This argument is simply false. The Supreme Court has made clear that intent in this area, like any other, may be proved by both direct and circumstantial evidence. A so-called "smoking gun" (in terms of actual expressions of discriminatory intent by members of the legislature) is simply not necessary. Plaintiffs can rely on the historical background of official actions, departures from normal practice, and other indirect evidence in proving intent. In this regard, the Voting Rights Act as currently written stands on the same footing as most other federal constitutional and statutory provisions in the civil rights area. Proof of wrongful intent as an element of the legislative offense is the rule -- not the exception. Adherence to that traditional standard in the present context is all the more compelling when one recalls that §2 is intended to be coextensive with the Fifteenth Amendment, which safeguards the right to vote only against purposeful or intentional discrimination on account of race or color.

Moreover, violations of §2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes. The district court judge in the Mobile case, for example, acting solely on the basis of perceived discriminatory "effects", struck down the city's three-member, at large commission system of government, which had existed in Mobile for 70 years. In its place the federal judge ordered a mayoral system with a nine-member council elected from single-member districts. It would be difficult to conceive of a more drastic alteration of local governmental affairs, and under our federal system such an intrusion should not be too readily permitted.

4. Section 2 in its present form has been a successful tool in combatting racial discrimination in voting. The House in its hearings on extension of the Voting Rights Act failed to make the case to support a change in the existing "intent" standard. Significantly, no testimony was offered as to election practices in non-covered jurisdictions to

indicate a need to introduce a nationwide "results" test in §2. When Congress decided in 1965 to depart from the "intent" standard embedded in the Fifteenth Amendment and to adopt an "effects" test for §5 as a "temporary" measure for specifically identified covered jurisdictions, it based that legislation on a comprehensive congressional record of abuses of minority voting rights. The Supreme Court upheld the constitutionality of such legislation because a basis for such drastic special remedial measures had been fully demonstrated. To seek some seventeen years later to impose a similar "effects" standard nationwide on the strength of a record that is silent on the subject of voting abuses in non-covered jurisdictions is not only constitutionally suspect, but also contrary to the most fundamental tenants of the legislative process on which the laws of this country are based.

Editorials & Letters
to the Editor

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Letters

The New York Times

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The Right to Vote Must Not Be a Right to Win

To the Editor:

Frank R. Parker's Op-Ed article of Feb. 8, "Saving Voting Rights," is a sample of the sophistry by which the "effects" test in the new Voting Rights Act will be defended.

Contrary to Mr. Parker's suggestion, determination of intent is not a matter of psychoanalysis, nor is it particularly difficult. Juries decide every day of the week whether a killing was premeditated or done in some other state of mind, and they do so without telepathy or smoking guns.

Indeed, the very idea of "discrimination" is that of an act done by the will of a rational being. A person can no more inadvertently discriminate than he can inadvertently rob.

And Mr. Parker's disavowals notwithstanding, to forbid "discriminatory effects" does lead down the slippery slope to electoral quotas. Effects tests have certainly done so in employment, despite the promises of proponents of the Civil Rights Act.

To say that disproportional representation is not "in and of itself" a violation is a transparently weak safeguard, since any further factor, however insubstantial and unrelated to anyone's intent to discriminate, is now admissible as the decisive factor.

The right to vote is indeed our "crown jewel." It is the right not to be interfered with in the exercise of the franchise, and it has no reference to election results. If no one stops you from voting, your right is intact, even if your candidate, or the candidate representing your racial group, regularly loses.

This is the merest common sense, as reaffirmed in *Mobile v. Bolden*. The change Mr. Parker advocates would turn the right to participate in an election into a presumptive right to win, and it would wholly pervert the democratic process.

MICHAEL J. VIN
Professor of Philosophy, City College
New York, Feb. 8, 1982

To the Editor:

Frank Parker's article is typical of the desultory debate which has accompanied the attempt to amend Section 2 of the Voting Rights Act. The City of Mobile case has not, as Parker contends, "drastically altered" the intent standard of the current Section 2.

A successful claim under the 15th Amendment has always been conditioned upon a showing of discriminatory intent. Justice Stewart cited a venerable line of cases in support of this contention; these cases routinely invalidated voting practices or procedures that were racially neutral on their face but could be traced to a "discriminatory intent."

In no case did this entail the necessity of finding a "smoking gun" or the psychoanalytic analysis of legislators' intention. The amendment that says it is necessary to do so has been created out of whole cloth by those who seek to create a radical new standard for the Voting Rights Act.

The great concern — and one which I share — is that the proposed amendment of the Voting Rights Act will lead to the requirement of proportional representation based on race. The language of the amendment seeks to dispel this fear, but its assurances ring hollow: lack of proportionality "in and of itself" does not constitute a violation.

In most recent years, emphasis has shifted from the issue of equal access to the ballot for racial minorities to that of equal results. The issue is no longer typically conceived of in terms of the right to vote but in terms of the right to an effective vote.

The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.

But if results become the new standard by which equal access to the political process is tested (as the amendment of Section 2 explicitly demands), then proportionality is inevitable. The argument, in its simplest form, presumes that a political process "equally open" to minorities will produce proportional results. When faced with a lack of proportional results, it is merely assumed that the political process is not "equally open."

All sides agree that the Voting Rights Act has been remarkably successful and that the imposition of the standard of racial proportionality would undo much of that success. The burden of proof rests upon those who would drastically alter the standards of intent to demonstrate more persuasively than they have that the amendment of Section 2 will not create the very thing that everyone wishes to avoid.

EDWARD J. ERLER
Research Triangle Pk., N.C., Feb. 10, 1982
The writer is a scholar in residence at the National Humanities Center.

The Voting Rights Act Works As Is

By editorial comment ("Voting Rights: Be Strong," Jan. 26), The Post urged endorsement of the House-passed amendment to Section 2 of the Voting Rights Act, which changes the standard for determining a violation from the current "intent" test to one that requires only a showing of discriminatory "effect." Remarkably, the case made for this position was that the House bill merely seeks to reinstate the standard in use before the Supreme Court decision in *City of Mobile v. Bolden*.

In the 1980 *Mobile* decision, the Supreme Court considered Section 2 of the Voting Rights Act for the first time and concluded that proof of discriminatory "intent" is necessary to establish violations of that provision. Contrary to The Post's editorial, this decision signaled no change in the law.

The act itself is unambiguous on this point. As Justice Potter Stewart observed in *Mobile*, Section 2 was enacted to enforce the guaranty of the Fifteenth Amendment, and that constitutional provision has always required proof of discriminatory intent. Had Congress intended to include in Section 2 an "effects" test, it certainly knew how; in 1965, and again in 1970 and 1975, Congress explicitly included an "effects" test in Section 5 of the Voting Rights Act (applicable only to selected jurisdictions), but chose not to put the same standard in Section 2 (applicable nationwide).

Nor have the courts suggested otherwise. The Post points to two decisions (*Whitcomb v. Chavis* and *White v. Regester*) in support of its claim that an "effects" test did in fact exist in

Section 2 before the *Mobile* decision. Neither case, however, even involved Section 2 of the Voting Rights Act; rather, they both concerned claims brought under the Equal Protection Clause of the Fourteenth Amendment. Moreover, even on the Fourteenth Amendment question, both *Whitcomb* and *White* tacitly recognized that proof of discriminatory intent is a necessary element of the constitutional offense. Justice Stewart's opinion in *Mobile* makes this clear, and The Post's editorial suggestion to the contrary is simply legally incorrect.

Also unsound is The Post's assertion that discriminatory intent is "virtually impossible" to prove. Several Supreme Court decisions have made it abundantly clear that a "smoking gun" in the form of incriminatory statements or documents has never been required. Intent in this area, as in any other, may be proved by circumstantial and indirect evidence. Notably, the equal protection clause of the Fourteenth Amendment, responsible for so many historic civil rights advances, has a similar test.

There is a general consensus in this country that the temporary provisions of the Voting Rights Act should be extended for an additional period of time. Congress should not, however, introduce uncertainty and confusion into what has been the most successful piece of civil rights legislation ever enacted by making so dramatic a change in its permanent provisions. Section 2 therefore should be retained without change.

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REVIEW & OUTLOOK

Voting Wrongs

New amendments to the Voting Rights Act of 1965 are up for Senate hearings this week and we wonder if the subcommittee on the Constitution will notice that they have a strange little quirk: In the name of protecting the right to vote they expand federal power to outlaw local elections. The contradiction escaped notice in the House, which already has passed the amendments.

This seems to be a case of Congress not knowing where to stop. The act, originally designed to overcome systematic denial of access to the polls in certain Southern states, has largely accomplished its purpose. In Mississippi, for example, 67% of the eligible blacks are registered, a ten-fold increase from 1965. But in 1975 the law was expanded beyond the South and extended to "language minorities" as well. Today, because of "trigger mechanisms" that invoke the law where rights violations are suspected, all voting districts in nine states and some in 13 others are required to "preclear" with the Justice Department any proposed changes in election procedures. Thirty states are required to provide bilingual election material and assistance.

Around 35,000 proposed election law changes have been submitted to the Justice Department since 1965. Of those, Justice refused to allow 811, the bulk of which involved alleged reductions in "minority" voting power through districting changes and use of at-large as opposed to district representation. In some cases, Justice has blocked elections; New York City, for example, has yet to hold its 1981 City Council elections because of a redistricting dispute with Washington.

In only about a tenth of these cases did Justice find any "intent" to discriminate; in the rest, under the act's strict "preclearance" test, it merely found that the proposed changes would have a discriminatory "effect." This "effects" test currently applies only to those states and localities which had a history of intentional discrimination or disproportionate voting patterns.

The Supreme Court has ruled that in other parts of the country the government must first prove "intent" to discriminate before it can apply the provisions of the act. Moreover, in upholding Mobile, Alabama's at-large

voting system in 1980, the Court said that some existing election practices may result in low representation of minorities among elected officials but that doesn't itself constitute "purposeful" discrimination. "The 15th Amendment," it added, "does not entail the right to have Negro candidates elected."

The House amendments to Section 2 of the Voting Rights Act would depart dramatically from the Court's logic. The federal government would no longer have to prove "intent" to discriminate in elections. It could merely cite voting practice "results" in alleging discrimination. The amendments would obligate the Justice Department to review elections in every state and municipality in the nation and to look not only at proposed changes in procedures but also at every existing election law. The biggest target would likely be the at-large system of voting used in two-thirds of the moderate-size municipalities in the U.S.

Now, the at-large system isn't perfect, but it does have certain merits and, indeed, has often been adopted in reform movements. For one thing, it makes it impossible for incumbents to hang onto their seats through redistricting.

We learned a long time ago that when you allow the Feds to assess "results," they end up doing it by essentially racist methods, dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative. Somehow this doesn't strike us as the way we should be moving if we are trying to remove the vestiges of racism in American society. Moreover, we don't find it comforting that the result so far of many disputes between the Feds and the local authorities often has been to suspend elections, disfranchising voters and allowing the incumbents to stay in power.

The amendments the Senate will vote on soon should be scrubbed in favor of a return to the intent test and a planned phase-out of the Voting Rights Act altogether as it becomes increasingly evident that no one is being kept from the polls because of his race, creed or color. Otherwise, we will end up with more, not less, racial and ethnic polarization.

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Voting Rights and Bloc Power

Proposed Bill Chips Away at the Notion of Majority Rule

By JOHN H. BUNZEL

The U.S. Senate is about to begin hearings on extending the Voting Rights Act of 1965. President Reagan and most members of Congress agree that the landmark law, which was extended and expanded in 1970 and 1975, should be extended for 10 more years. But a real fight is shaping up over how to go about it.

One of the major issues involves the "intent-effects" distinction drawn by the U.S. Supreme Court that the House-passed voting-rights measure is seeking to overturn. Section 2 of the act, which is applicable nationwide, protects all citizens from having their right to vote denied or abridged on the basis of race or color. It has traditionally been understood to mean, and was reaffirmed by the Supreme Court in 1980, that a violation of that law requires a demonstration of intention or a discriminatory purpose. The court has also ruled that only if there is "purposeful discrimination" can there be a violation of the equal-protection clause of the 14th Amendment.

The House-passed measure would change the standard of proof for Section 2 lawsuits by eliminating the requirement that an electoral jurisdiction has intentionally discriminated in voting laws. Instead, it need only act "in a manner that results in a denial or abridgment" of voting rights. The House proposes a standard for identifying discrimination that looks to the racial "effects" or "disparate impact" of some particular action on blacks or other minorities rather than on whether or not the action was undertaken for an illegal purpose.

It would go beyond the existing standard that covers specified jurisdictions with histories of electoral discrimination (mostly in the South) and bans all election practices—gerrymandering election districts, for example—that prevent minorities from enhancing their political power. The proposed legislation would change the right of minorities to vote to an effective right to vote. In short, not only should blacks and Latinos

have the right to select black and Latino candidates—an unarguable right—but also blacks should have the maximum political opportunity to be represented by blacks and Latinos by Latinos.

The presumption is that minorities will be able to increase their political strength and influence only if Congress changes Section 2 of the Voting Rights Act so that blacks and Latinos have more than equal access to the ballot box. They must somehow be assured of equal electoral results. The center of concern would move from eliminating racially motivated discrimination in the voting process to endorsing a theory of group representation that would push our politics closer to institutionalizing a system of single-member districts and racial-bloc voting.

This, it is claimed, is the only way to make sure that the black or Latino vote is not diluted, and that every ethnic group is "fully represented." What worries many observers is that it is only a short step to sanctioning the concept of proportional racial and ethnic representation.

Thus, as Nathan Z. Dershowitz and Marc D. Stern of the American Jewish Congress point out, a law designed to guarantee full minority participation in the democratic process can also undermine a major tenet of that process—majority rule. "What is worse, it does so by insisting that racial considerations be used to dictate election results."

It is in this light that one must weigh carefully the implications of new language in the House-passed measure, which says that the fact that members of a minority group have not been elected "in numbers equal to the group's proportion of the population" shall not constitute a violation of Section 2 "in and of itself." That is the key phrase—and the sleeper. It calls to mind the difference between quotas and goals in affirmative action. Proportional representation may be wrong, but the "effects" test is

said to be right and necessary in much the same way that engaging in racially preferential treatment is claimed to be the right remedy for past discrimination.

A more fundamental problem involves the kind of representation to which blacks and other minorities are entitled. Consider a Western state that has a 30% black population but only 15 black state senators out of 100. By itself, this "disproportionate representation" would not violate Section 2. But it could serve as a trigger mechanism. The Justice Department could take a look at the discrepancy in registration figures between blacks and whites, or the disparity in state funds between black and white educational facilities, or the maldistribution of public services, and claim that any one of these additional factors constitutes that scintilla of evidence to make a violation stick.

Furthermore, the "effects" test would permit this kind of evidence in order to "prove" that Section 2 had been violated. By contrast, all factors and circumstances would have to be examined together, as a total package, to satisfy the standard of purposefully discriminatory intent.

Those who have been long-time friends of civil rights are not suddenly enemies simply because they do not favor an electoral system that would shield a black candidate running for office from a white candidate, or because they do not believe that elected officials of one race cannot represent the interests of another. They continue to support the original aims of the Voting Rights Act because they remain committed to working toward an integrated political process rather than toward the goal of black or Latino power that, they feel strongly, is not the true test of electoral equality.

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